

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Revision Jurisdiction)**

Criminal Revision No. 1329 of 2017

In the matter of:

An application under section 439 read with section 435 of the Code of Criminal Procedure, 1898

-And-

In the matter of:

Md. Abdul Latif Bhuiyan

..... Accused-Petitioner

-Versus-

The State and another

.....Opposite Parties

Mr. Imran Siddiq, Advocate

.....for the Accused-Petitioner

Mr. Md. Khalilur Rahman with

Mr. Junaed Hossen Khan, Advocates

.....for the opposite party No. 02

Mr. Dr. Md. Bashir Ullah, D.A.G with

Mr. Mohammad Shaheen Mirdha, A.A.G and

Ms. Farzana R. Shampa, A.A.G

.....for the State

Present:

Mr. Justice Jahangir Hossain

And

Mr. Justice Md. Badruzzaman

Judgment delivered on 08.10.2020

Jahangir Hossain, J:

Upon an application under section 439 read with section 435 of the Code of Criminal Procedure, 1898, this Court by order dated 16-05-2017 issued a Rule calling upon the Opposite Parties to show cause as to why the impugned order No. 23 dated 30-03-2017 passed by the Metropolitan Joint Sessions Judge, 5th Court, Dhaka in Metropolitan Sessions Case No.

10565 of 2014 arising out of C.R Case No. 1725 of 2014 under section 138 of the Negotiable Instruments Act, 1881 rejecting the application filed by the accused-petitioner under section 94 of the Code of Criminal Procedure [shortly the Cr.P.C], for an order of summons upon the opposite party No. 2 to produce the registered deed of agreement for sale being deed No. 6115 dated 17-11-2011 should not be set aside.

The relevant facts for disposal of the Rule in short, are that on 25-08-2014 the Opposite Party No.2 as complainant filed a complaint case being C.R Case No. 1725 of 2014 before the Court of Chief Metropolitan Magistrate, Dhaka under Section 138 of the Negotiable Instruments Act, 1881 [briefly the Act] against the accused-petitioner alleging, inter-alia that pursuant to previous business transaction, the accused- petitioner issued a cheque to the complainant being cheque No. 0806567 dated 30-06-2014 for an amount of Tk. 1,00,000/- [one Crore] which was drawn on the accused petitioner`s account being No. 0000000000193 maintained with Agrani Bank Limited. The complainant presented the cheque for encashment but the cheque was dishonored on 08-07-2014 due to insufficiency of fund. The complainant through his lawyer sent a legal notice to the accused-petitioner on 21-07-2014 but the accused-petitioner failed to pay the cheque amount, or to provide any reply to the said legal notice. Hence the complaint case was started.

Having examined the complainant under section 200 of the Cr.P.C, the Metropolitan Magistrate took cognizance of offence under section 138 of the Negotiable Instruments Act against the accused-petitioner who

appeared in the case subsequently and obtained bail. Eventually, the case was transmitted to the Metropolitan Joint Sessions Judge, 5th Court, Dhaka who framed charge against the accused-petitioner under section 138 of the Act by order dated 02-06-2015. It has been further stated in the present application that the Opposite Party No. 2 provided evidence as Pw-01 before the Trial Court and was cross-examined by the defense and the accused-petitioner also deposed as Dw-01.

On 30-03-2017, the accused-petitioner filed an application before the trial court under section 94 of the Cr.P.C for an order of summons upon the complainant to produce a registered deed of agreement for sale being deed No. 6115 dated 17-11-2011 and a registered power of attorney being deed No. 6116 dated 17-11-2011 stating that those are related to the business transaction between the parties for which production of the same was necessary for arriving at a proper and just decision. But the Trial Court vide order dated 30.03.2017 rejected the accused-petitioner's application without assigning any reason. It is further stated in the application that the accused-petitioner having based on a misconception of law, filed a criminal revision No. 333 of 2017 before the Metropolitan Sessions Judge, Dhaka, challenging the legality of the said order although no such revision application was maintainable under the provision of Cr.P.C. The learned Sessions Judge by order dated 17.04.2017 rejected the said application filed by the accused petitioner.

Being aggrieved by and dissatisfied with the earlier order dated 30.03.2017 passed by the trial court, the accused-petitioner presented the

present application before this Court and obtained the instant Rule with an order of stay.

Mr. Imran Siddiq, the learned advocate for the accused-petitioner submits that the learned judge of the trial court has failed to assign any reason for rejecting the accused petitioner`s application filed under section 94 of the Cr.P.C. It is further submitted that the production of the registered deed of agreement for sale and the registered power of attorney both dated 17-11-2011, are very essential in order to establish the defense plea but by the impugned order the learned judge prejudiced the accused-petitioner. Citing decisions held in the case of Shafiqul Islam (Md) and others–Versus-Bangladesh and others, reported in 68 DLR (2016), 282 and K.V. Rama Krishna Reddy–Versus-The State, reported in MANU/AP/0170/1974, learned Advocate submits that the accused-petitioner is entitled to take any meaningful defense. As the production of documents is related to the business transactions between the complainant and the accused-petitioner, those should be produced before the trial court at the time of trial. The impugned order of rejection of the application is bad in law and liable to be set aside for securing ends of justice.

On the contrary, Mr. Md. Khalilur Rahman learned Advocate by submitting a counter-affidavit contends that the accused-petitioner has failed to prove the act of agreement for sale and registered power of attorney in his deposition. Rather he admitted that he issued a cheque in favour of the opposite party No. 02. On the self same issue the accused-petitioner earlier filed another application under section 540 of the Cr.P.C.

Even then, he also filed a criminal revision before the Metropolitan Sessions Judge only for dilatory tactics and harassing the complainant-opposite party No.02 and as such the Learned Judge of the Court below rightly passed the impugned order on 30-03-2017.

We have heard the contentions of learned advocates of both the parties, perused the application, petition of complaint, impugned order and other connected documents annexed herewith.

In the instant Rule, the question arises as to whether the accused-petitioner's application under Section 94 of the Cr.P.C is at all maintainable or not, at this stage when the evidence of both parties has been taken over by the trial court upon thorough examination of the witnesses. It appears from the application [Annexure-B1 to the application] filed by the accused-petitioner under Section 265(C) of the Cr.P.C before the trial court that the accused-petitioner admitted in paragraph No. 07 that he issued a blank cheque in favour of the complainant for an amount of Tk. 100000/-[one lakh] as loan but on the cheque the amount was written one crore instead of Tk. 100000/-[one lakh] fraudulently by the complainant.

It also appears that on this question of amount, the defense elaborately cross-examined the complainant as Pw-01 on 5.11.2015. Thereafter, on re-call the Pw-01 was again cross-examined by the defense upon the issuance of the cheque as well as amount of the cheque-money and other things. The accused-petitioner himself provided evidence as Dw-01 disputing the question of amount of the cheque before the Trial Court on 15.05.2016. When taking evidence of both sides was over, the accused-

petitioner presented an application under Section 94 of the Cr.P.C before the trial court. For better understanding section 94(1) of the Cr.P.C is quoted verbatim below:

94. (1) Whenever any Court, or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order:

Provided that no such officer shall issue any such order requiring the production of any document or other thing which is in the custody of a bank or banker as defined in the Bankers' Books Evidence Act, 1891 (Act No. XVIII of 1891), and relates, or might disclose any information which relates, to the bank account of any person except,-

(a).....

(b).....

(2).....

(3).....

Now the question before us whether the application filed by the accused-petitioner under the aforesaid section is for any proper adjudication of Justice or any other purpose which may prolong the trial of the case.

It appears from documents on record that the case was filed on 25.05.2014. The accused-petitioner appeared in the case on 20.10.2014 and on 14.01.2015 the trial court received the case record for trial and disposal and fixed date to 09.04.2015 for framing of the charge. On that date the hearing of framing charge was deferred to 02.06.2015 upon prayer of the accused-petitioner. Thereafter, the charge was framed against the accused-petitioner under section 138 of the Negotiable Instruments Act on 02.06.2015.

The complainant as Pw-1 was examined on 05.11.2015 and the accused-petitioner was examined as Dw-01 on 11.05.2016. The complainant was again cross-examined on the re-call prayer of the accused-petitioner on 26.02.2017 and 30.03.2017 respectively, which shows that two witnesses were examined by taking more than one and half years after framing charge.

The accused-petitioner has not provided herewith entire order sheets of the trial court so that it can verify for whom such delay has occurred in the case. But it has suggested considering the conduct of the accused-petitioner that he intends to make a dilatory tactics raising a new plea after conclusion of evidence of both parties.

The new plea of the accused-petitioner is that the trial court ought to have issued summons upon the complainant to produce registered deed of agreement and power of attorney which were related to the business transactions between both parties.

If such registered documents are at all essential in disposal of the case, the accused-petitioner could easily obtain certified copies of the aforesaid registered deed and power of attorney and could place the same before the trial Court as secondary evidence as per section 63 of the Evidence Act, 1872. Section 63 of the Evidence Act, stipulates as follows;

“63. Secondary evidence-Secondary evidence means and includes-

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral account of the contents of a document given by some person who has himself seen it.”

According to section 63(2) of the Evidence Act, the copies made by mechanical process ensure the accuracy of the copy after having compared with it. So there is no restriction in law that the accused-

petitioner will not be permitted to obtain certified copy of the aforesaid registered deed and power of attorney from the concerned registry office.

The contention of learned Advocate for the accused-petitioner by citing decision of 68 DLR (2016) 283 is that the trial court has ample power to give opportunities to the accused-petitioner for taking meaningful defense. We do not have any disagreement with the view of the learned judges of the High Court Division held in the aforesaid case that the meaningful defense must be provided for the ends of justice. But it is to be seen first whether the production of alleged documents is so necessary or desirable that it should be provided as being relevant or having some connection with this subject matter.

There is another aspect of the Rule, such as the accused-petitioner earlier has challenged the self same impugned order dated 30.03.2017 in Criminal Revision No. 333 of 2017 before the learned Metropolitan Sessions Judge, Dhaka, who, upon hearing, rejected the same vide order dated 17.04.2017. The accused-petitioner without challenging the said order dated 17.04.2017 again challenged the order of the trial court dated 30.03.2017 before this Court under revision which is not at all maintainable. It is settled principle that a revision is maintainable before the learned Sessions Judge under section 439A of the Cr.P.C against an order passed by the learned Joint Sessions Judge.

It appears from the conduct of the accused-petitioner in the trial of the case that his claim of production of the registered deed and power of attorney by the opposite party No. 2 is his second plea. These are not

connected with the cheque in question. The claim of production of those documents at the end of trial indicates that the accused-petitioner is just trying to make delay in the trial which has been elaborately discussed by the trial court in the impugned order. Moreso, this Rule is not also maintainable because of the fact that a revision is not maintainable against an order passed by the learned Metropolitan Joint Sessions Judge.

Having considered the discussions made above we do not find merit in the Rule. Therefore, the rule, issued by this court, is hereby discharged without any order as to cost. The order of stay of the proceeding shall stand vacated. However, the trial court is directed to dispose of the case as early as possible.

Let a copy of this Judgment be communicated to the concerned court below at once.

Md. Badruzzaman,J

I agree

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